



1 On February 7, 1979, respondent agency (hereinafter referred to  
2 as "respondent") moved that this Board's consideration of matters  
3 raised under the State Environmental Policy Act (SEPA) be limited  
4 to the record compiled by the agency. Murphy Brothers, Inc. joined  
5 in the motion. After hearing arguments, the motion was granted.  
6 Appellant made an offer of proof and the hearing was continued to a later  
7 date. Respondent's record of its proceeding was thereafter certified  
8 to this Board; additional briefs from respondent and Murphy Brothers,  
9 Inc. were filed.

10 On April 18, 1979, the hearing reconvened. Murphy Brothers,  
11 Inc. moved to dismiss the appeal on the ground that respondent did  
12 not issue any appealable order or decision. The motion was taken  
13 under advisement. Thereafter, counsel made arguments on appellant's  
14 challenge to the respondent's declaration of non-significance  
15 pursuant to SEPA, and on appellant's contention that the appearance  
16 of fairness doctrine was violated.

17 Having read the record, having considered the offer of proof,  
18 and having considered the contentions of the parties, the Pollution  
19 Control Hearings Board makes these

#### 20 FINDINGS OF FACT

##### 21 I

22 This matter concerns the validity of Resolution and Order  
23 Number 78-09 issued by respondent on November 22, 1978 which authorized  
24 the approval of a "Notice of Construction and Application for Approval"  
and Final Declaration of Non-Significance for a proposed sand and  
26 gravel mine and asphalt plant situated in Spokane County.

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

## II

The "Notice of Construction and Application for Approval" for the proposed project was filed with respondent on October 5, 1978. The notice was accompanied by a detailed environmental checklist which included the results of special environmental studies. On October 7, 1978 respondent issued a proposed declaration of non-significance for review by agencies with jurisdiction or expertise, including the Spokane County Engineering Department, the Spokane County Building Codes Department, the Spokane County Health District, the Washington State Department of Ecology, the Washington State Department of Natural Resources, the Washington State Department of Parks and Recreation, the Washington State Department of Transportation and the Environmental Protection Agency. Pursuant to notice, respondent provided a 30-day public comment period on the proposed project and held public hearings on November 7 and 14, 1978 at which time members of the public were given an opportunity to submit written and oral statements on the proposal. On November 22, 1978 respondent's Board of Directors voted to approve the issuance of the "Notice of Construction and Application for Approval" and a final declaration of non-significance. Appellant, comprised for the most part of citizens living around Riverside State Park, timely appealed the approval to this Board on December 8, 1978.

## III

In 1963, the project site was zoned to its present classification of Mining Class III by Spokane County. This 1963 zone change made permanent a prior use under a special permit for a sand and gravel mine. The project site has been mined intermittently since 1959.

1 The proposed asphalt plant is a permitted use in the mining zone  
2 classification.

#### 3 IV

4 Presently the site of the proposed project is vacant land. This  
5 site is surrounded by Riverside State Park on the east, west and south.  
6 The parkland to the south and west of the site has been developed  
7 as an all-terrain vehicle (ATV) riding area. The developed ATV area  
8 encompasses approximately 700 acres of land and is an intensive use  
9 which produces air quality, noise, flora, fauna, and transportation  
10 impacts in the area. A state park ranger's residence for  
11 administration of the ATV area has recently been constructed by the  
park commission in the park. An island of private property exists  
13 to the north of the site and is occupied by five private residences.  
14 The closest residence to the north is located about 1800 feet from the  
15 project site. A Bonneville power transmission line easement of 400  
16 feet is situated between the residences and the project site.

#### 17 V

18 Two mining operations exist in the vicinity of the project site.  
19 A gravel pit operated by the Washington State Parks and Recreation  
20 Commission is located about 2000 feet east of the project site. The  
21 pit is not presently being mined but a large stockpile of screened  
22 aggregate is located on the site. The County actively hauled gravel  
23 from the pit during the summer of 1978 for road construction projects.  
24 A second mining operation is located about two miles south of the  
project site where Burlington Northern Railroad operates a basalt  
26 quarry. The latter operation has produced material for railroad track

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

improvements over the past years.

## VI

Murphy Brothers, Inc. purchased the instant 24 acre site in June of 1978 and has proposed to construct and operate an asphalt plant and associated aggregate crushing and screening plant on the property. The gravel deposit on the site contains relatively fine material and will be excavated using front-end loaders, tractors and other earth moving equipment. No blasting, drilling, or other fracturing of material will be required in the mining operation. The mining operation will generally be limited to the winter months when the asphalt plant is not operating. As the material is mined, it will be crushed, screened, and conveyed to storage piles. A three-stage crushing and screening system will be used. The aggregate is relatively fine in size and only a small portion of the gravel will actually be crushed. Operation of the sand and gravel processing facilities will coincide with the mining operations and will also generally be limited to the winter months. The gravel processing operation will have a maximum operating capacity of 5,000 tons per day. The aggregate mined and processed from the project site during the winter months will be stockpiled and then used in the manufacture of asphaltic concrete during the remaining eight or nine months of the year. Approximately three million tons of aggregate will be removed over a 30 year period.

## VII

Four air pollution sources will result from this proposed project: 1) fugitive dust from earth moving equipment in mining operations; 2) fugitive dust from the crushing and screening

1 operation; 3) particulate and hydrocarbon emissions from the operation  
2 of the asphalt plant; 4) dust and emissions resulting from  
3 truck movement. By providing asphalt surfacing for roads, using water  
4 and dust palliative, and strategically locating water sprays, dust  
5 from the operation will be controlled and minimized. Mining operations  
6 and crushing and screening operations will occur during the winter  
7 months; the asphalt plant will operate during most of the year. The  
8 estimated maximum emissions from the combined equipment  
9 are about 31 tons per year. The net impact of the project  
10 is an increase in the level of air pollution in the vicinity  
11 of the site. However, this increase was not shown to result in the  
12 violation of any emission or air quality standard.

#### 13 VIII

14 The proposal included measures proposed by the applicant (see Exhibit A  
15 to mitigate and reduce potential adverse environmental impact. Some  
16 measures which were offered included the following:

17 A. The size and scope of the mining operation was limited  
18 to provide a site which can be rehabilitated for  
19 residual use. The depth of the pit is limited to  
20 an elevation of 1780 feet which allows the removal  
21 of approximately three million tons of aggregate  
22 whereas aggregate in excess of four million tons could  
23 be economically mined from the site at a greater  
24 depth.

25 B. The construction of earthen berms to a height of  
26 20 feet are included in the project design for  
27 the north and south boundaries of the site. These  
berms will significantly reduce potential noise  
impacts from on-site activities. The berms will  
also visually screen the site from adjacent  
residences and roadways.

C. Noise abatement technology is incorporated into  
the design of the gravel processing and asphalt

2 plant. The asphalt plant to be constructed will  
3 be a new plant which utilizes the most current  
4 available technology. This includes a specially  
5 designed sound attenuator for the asphalt plant  
6 dryer burner and teflon bearings in dust screws.  
7 In addition, a minimum noise fan design is utilized  
8 for the baghouse exhaust fan.

9 D. Best available control technology will be used to  
10 control air pollutants from the proposed processing  
11 plant. The asphalt plant will utilize a high  
12 efficiency bag filtration system which will  
13 reduce project related particulate emissions to  
14 less than 20 tons per year.

15 E. Inland Road, which provides access to the project  
16 site, will be widened and paved to meet Spokane  
17 County Standards. This road presently provides  
18 access to the Riverside State Park ATV area. The  
19 paving of the road will reduce particulate emissions  
20 in the area.

21 F. A turning lane will be constructed on Seven-Mile  
22 Road at the intersection with Inland Road for left  
23 turning vehicles.

24 G. A fence will be constructed around the project as  
25 required by zoning ordinances which will prevent  
26 access to the project site by persons or animals.

27 Respondent's decision to issue the declaration of non-significance  
and to approve construction was based on their reliance of the  
description of the proposal as modified by 15 proposed conditions (See  
Exhibit A which was proposed but not incorporated in the approval).

## 28 IX

29 The decision by respondent to issue the final declaration of  
30 non-significance was made after substantial environmental analysis  
31 and review. In addition to the expanded environmental checklist that  
32 was submitted with the notice of construction, Murphy Brothers, Inc.  
33 provided respondent with the result of two special noise studies. One  
34 evaluated the impact of trucks along the proposed haul route, and the

1 other assessed the noise impact of on-site activities on residences  
2 located near the project site. Beyond the information submitted by  
3 the sponsor of the project, respondent consulted with other agencies  
4 with jurisdiction or special expertise. All agencies with jurisdiction  
5 over the project concurred with the declaration of non-significance.  
6 The Washington State Parks and Recreation Commission (an agency with  
7 expertise) suggested that the project would have a significant adverse  
8 environmental impact and would require a full environmental impact  
9 statement. However, the position of the Commission was later modified  
10 because its concerns about the project were resolved as a result of  
11 further information received at the hearing.

X

12 At the outset of the hearing held on November 7, 1978 which was  
13 attended by members of appellant, respondent's Director advised the Board  
14 of Directors that respondent's staff included an employee named Bill  
15 Murphy who was related to the President of the applicant of the instant  
16 project. Bill Murphy, an engineer for respondent, did not in any way  
17 participate in the processing of the instant application.

XI

18 Any Conclusion of Law which should be deemed a Finding of Fact  
19 is hereby adopted as such.

20 From these Findings the Board comes to these

21 CONCLUSIONS OF LAW

22 I

23 Pursuant to RCW 43.21B.260, respondent has filed a certified  
24 copy of its Regulation I (Articles 1-7) and amendments thereto which

25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER



are noticed.

## II

The initial consideration raised in this case by motion of Murphy Brothers, Inc. is whether respondent's approval was an action subject to the procedural requirements of SEPA. We conclude that respondent's approval was a major action (WAC 197-10-040(24)) and was an order reviewable by this Board (chapter 43.21B RCW).

Respondent's decision to approve construction was made pursuant to Article 5 of its Regulation I. The regulation requires that no person shall construct, install or establish a new air contaminant source with certain exceptions unless a "Notice of Construction and Application for Approval" has been filed and approved by the agency. Section 5.01.A. Within 30 days of receipt of such notice, the agency may require the submission of plans, specifications, and such other information it deems necessary to determine whether the proposed source will be in accord with applicable rules. Section 5.02. Within 15 days of receipt of such information, the agency makes a preliminary determination and publishes notice allowing the public an opportunity to submit written comments during a 30 day period under certain conditions. Section 5.03. Within 15 days after the comment period, or within 30 days after receipt of the information required by Section 5.02, the agency shall approve the application or issue an order that the source will not comply with the regulation. Section 5.04.A. No approval is issued unless the information required by Section 5.02 evidences that 1) the equipment will not violate an emission standard, 2) the equipment incorporates all known available and reasonable

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 methods of emission control and will meet U.S. Environmental Protection  
2 Agency standards, and 3) operation of the source will not result in an  
3 ambient air standard being exceeded. Section 5.04.B. If the agency  
4 does not issue an order stating that the source will not comply with  
5 the regulation within the time period provided, the construction,  
6 installation or establishment may proceed as proposed. Section 5.04.C.

7 Article V of Regulation I is essentially an agency notice  
8 requirement for any new air contaminant source in its jurisdiction.  
9 Unless the agency requires more information, or an applicant provides  
10 information in addition to the notice, the proposed new source may  
11 proceed; otherwise, Sections 5.03 and 5.04 apply and a decision  
12 approving or denying the proposal may be made. Here, the applicant  
13 supplied other information, including an expanded and descriptive  
14 environmental checklist, special environmental studies, and a  
15 mining and reclamation plan. Therefore Sections 5.03 and 5.04 are  
16 applicable. Respondent agency approved the application under Section  
17 5.04. Consequently, it granted a "license" within the meaning of  
18 WAC 197-10-040(20), and the activity was not categorically exempted by  
19 WAC 197-10-170(12) from the threshold determination of SEPA. Had  
20 respondent merely accepted the filing of the notice and had the  
21 applicant not provided other information, the activity would have  
22 been categorically exempted under WAC 197-10-170(12).

### 23 III

24 Two matters remain for resolution: 1) whether the proposal is  
25 a major action which will have a significant adverse effect upon the quality  
26 of the environment (WAC 197-10-350(1)) thereby requiring the preparation

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

of an environmental impact statement (EIS) (WAC 197-10-400); and 2) whether the appearance of fairness doctrine was violated thereby rendering the decision void. Appellants raised no issues under the Clean Air Act, chapter 70.94 RCW or under respondent's Regulation I (Articles 1-7).

Respondent determined that it should be the lead agency under SEPA for the project, which included a sand and gravel mining site, a sand and gravel processing plant and a batch hot-mix asphalt concrete plant. The lead agency assumption appears to follow the provision of Section 8.203 of Regulation I. (See also WAC 197-10-203(1)). However, the instant proposal is a private project which requires other non exempt licenses from other agencies, including nonexempt permits and/or licenses from the county. Consequently the proper lead agency should have been the county. Section 8.220. (See WAC 197-10-220).<sup>1</sup> As an agency with jurisdiction where it was not properly a lead agency, responder should not have issued a Declaration of Non-Significance or prepared an EIS or required its preparation by Murphy Brothers, Inc.; rather, it should have used that SEPA document which would be issued by the lead agency.<sup>2</sup> Section 8.203D. This is not to say that respondent could never be a lead

---

1. The county and respondent could agree to share or divide lead agency duties. WAC 197-10-245

2. Respondent would continue to have a role in the process whether the county elected to issue a declaration of non-significance (See WAC 197-10-340) or EIS (See WAC 197-10-500).

Although respondent's rules provide that a new source may be established after a comment period or receipt of further information, as the case may be (Section 5.04A), consideration of an application could be suspended pending receipt of pertinent environmental information from the proper lead agency.

1 agency; rather, respondent should not assume lead agency status initially  
2 when the county also requires a nonexempt license from the applicant.  
3 WAC 197-10-220. We conclude that respondent erred in assuming lead agency  
4 status in this case. The county, as compared to respondent SCAPCA, is  
5 better suited and staffed to assess the many environmental impacts,  
6 excepting air pollution, which may result from a proposal. Respondent does  
7 not have broad jurisdiction such as does the county or even a broader  
8 environmental mission such as does the Department of Ecology (chapter 43.21A  
9 RCW); rather, respondent's sole statutory mission relates to air  
10 pollution (chapter 70.94 RCW). Thus, when respondent attempts to  
11 address many environmental factors and identify such measures that  
12 could be taken to prevent or mitigate environmental impacts, its lack  
13 of authority to impose and enforce conditions to mitigate or prevent  
14 adverse impacts becomes apparent. (See WAC 197-10-355 and 370).  
15 Respondent, a single-purpose agency, would in effect be attempting to  
16 condition permits or licenses outside of its primary jurisdiction.  
17 Before the SEPA guidelines became effective, this may have been required.  
18 See Stempel v. Department of Water Resources, 82 Wn.2d 109 (1973). The  
19 SEPA guidelines attempted to sort out the jurisdictional conflicts and  
20 duplication of efforts through the use of the lead agency designation.  
21 Thus, when an agency improperly assumes lead agency status for all purposes  
22 and permits, jurisdictional problems arise. Under the guidelines  
23 respondent is not properly the lead agency; only a lead agency can make  
24 a threshold determination. Thus, respondent's declaration of non-  
significance is not binding under WAC 197-10-390.

26 The policy of SEPA, which is to insure full disclosure of

environmental information so that environmental matters can be given proper consideration during decision making, is thwarted when an incorrect threshold determination is made. The record of a declaration of non-significance by a governmental agency must "demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." Juanita Bay Valley Community Assoc. v. Kirkland, 9 Wn. App. 59 (1973); Sisley v. San Juan County, 89 Wn.2d 78, 84, 85 (1977). The record must demonstrate that actual consideration was given to the environmental impact of the proposal. Lassila v. Wenatchee, 89 Wn.2d 804, 814 (1978); Bellevue v. Boundary Review Board, 90 Wn.2d 856, 867 (1978).

This Board does not make a threshold determination; rather, that function is the responsibility of the "lead agency" under chapter 197-10 WAC. The determination of such lead agency must be given "substantial weight." RCW 43.21C.090. "Substantial weight" to a decision to make a declaration of non-significance is afforded by the use of the "clearly erroneous" standard of review upon an adequate agency record. Norway Hill v. King County Council, 87 Wn.2d 267, 275 (1976).

Respondent has submitted an adequate SEPA record which included an expanded environmental checklist, staff documents and analysis, comment letters, exhibits, and a complete verbatim transcript of the hearings. A review of the record reveals an analysis and synthesis of the information and comments received both favorable and unfavorable to the proposal. The respondent's Board actually considered environmental factors, and discussed and explained the reasons for their



DATED this 11<sup>TH</sup> day of May, 1979.

POLLUTION CONTROL HEARINGS BOARD

Dave J. Mooney  
DAVE J. MOONEY, Chairman

Chris Smith  
CHRIS SMITH, Member

David Akana  
DAVID AKANA, Member

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

Proposed Conditions to the Approval of the Murphy Brothers, Inc.  
Notice of Construction and Application for Approval:

1. That the sand and gravel mining operation and mine be limited to a pit elevation no deeper than elevation 1780 feet.
2. That the mining and rehabilitation plan for the project site be approved by the Washington State Department of Natural Resources.
3. That the property be rezoned to "Agricultural" at the completion of the mining phase of the project.
4. That the Washington State Parks and Recreation Commission, Spokane County and the City of Spokane be given an option to purchase the project site at the completion of the project for fair market value.
5. That the surface mine, gravel crushing and screening and asphalt plant will operate only during daylight hours. - 8 t/o (?)
6. That earthen berms will be constructed along the northern and southern margins of the project site to provide visual and noise buffers for residences located in the area.
7. That the operation of the plant will be in compliance with all SCAPCA regulations including the requirement of Best Available Control Technology.
8. That all reasonably available noise abatement technology at the time of construction be utilized to eliminate noise from the project site at its source.
9. That an approved fence be constructed around the project site to prevent access by persons or animals.
10. That existing vegetation be retained along the southern margin of the project site to provide a visual and noise buffer for the Park rangers residence being constructed adjacent to the project site.
11. That a new asphalt plant using currently available technology be constructed rather than a used plant.
12. That all asphalt storage tanks be located underground.
13. That Inland Road south of the project site will not be used by truck traffic to or from the project site until such time as it is upgraded and made suitable for heavy truck traffic.
14. That the project sponsor cooperate with the Spokane County Engineers Office and the State of Washington in making the necessary roadway improvements to provide safe and adequate access to the project site. The project sponsor shall pay for his fair share of the costs of such improvements as required by the Spokane County Engineers Office.



Conditions, Page 2

15. That Inland Road be improved and asphalt surfaced from Seven-mile Road to the project site prior to the operation of the asphalt plant.